LA Film School, LLC and its branch, LA Recording School, LLC *and* California Federation of Teachers *and* Brandii Grace. Cases 31–CA–029627, 31–CA–029642, 31–CA–029719, 31–CA–029773, 31–CA–029775, and 31–CA–029776

March 26, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On April 6, 2011, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed exceptions and an answering brief, and the Respondent filed a reply brief and an answering brief to the Acting General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, LA Film School and its branch, LA Recording School, LLC, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified retaliation if they engage in union or other protected concerted activities.

(b) Promising employees benefits in order to discourage their support of the Union.

(c) Instructing employees not to attend meetings where others were discussing terms and conditions of employment and the Union.

(d) Creating an impression that their employees' union activities are under surveillance.

(e) Disparately and discriminatorily enforcing its security policy by evicting union representatives and requiring management's approval for their visit.

(f) Promulgating, maintaining, or enforcing a new security policy in order to discourage union activities.

(g) Helping employees withdraw their union authorization cards.

(h) Terminating or suspending any employee for engaging in union activities.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its "Visitor Policy" stated in a March 11, 2010 interoffice memorandum and notify employees in writing that the policy is no longer in force.

(b) Within 14 days from the date of this Order, offer Brandii Grace full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that the termination of Charging Party Brandii Grace was unlawful under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Contrary to the judge's recitation of the *Wright Line* standard, however, there is no requirement that the Acting General Counsel show, as an element of his initial burden, that the Respondent's union animus caused the adverse action or that there was a nexus between the two. See, e.g., *Mesker Door*, 357 NLRB 591, 592 and fn. 5 (2011).

In finding that Grace did not engage in postdischarge misconduct that would bar her reinstatement, we rely only on the judge's finding that the Respondent failed to prove that she deleted the hard drive partition from her school-provided laptop. We do not reach the issue of whether such conduct would have rendered her "unfit for further service" under *Hawaii Tribune-Herald*, 356 NLRB 661 (2011). In finding that the Respondent had knowledge of Grace's union activity, Member Hayes does not rely on Supervisor Ariel Levy's attendance at a union meeting.

In finding that the Respondent violated Sec. 8(a)(1) by expelling nonemployee union representative, Peter Nguyen, from its premises, we rely on the judge's finding that, as in *Hawaii Tribune-Herald*, the Respondent failed to follow its own security policy. Id. at slip op. 1, 6–7, 16–17.

In adopting the judge's finding that, pursuant to the test set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), Supervisor Bobby Milly did not effectively repudiate his order not to attend union meetings, Chairman Pearce and Member Griffin do not rely on the judge's finding that Milly's retraction was "reasonably timely." Member Hayes does not necessarily endorse all elements of the *Passavant* test, but he agrees that the Respondent did not effectively repudiate Milly's order.

[3] The Acting General Counsel has excepted to the judge's recommended Order insofar as the Order fails to require the Respondent to rescind its new security policy or to remove from its files any reference to Grace's suspension. We find merit in these exceptions and have modified the recommended Order accordingly. The judge also provided for distribution of the notice by email; we have modified his recommended Order to include the Board's standard language regarding electronic notice-posting. Finally, the judge included a narrow cease-and-desist provision in his recommended Order, but the notice attached to his decision inadvertently includes a broad cease-and-desist provision. We have substituted a new notice to conform to the recommended Order as modified and to substitute a narrow cease-and-desist provision.

(c) Make Grace whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to Grace's unlawful suspension and discharge, and, within 3 days thereafter, notify her in writing that this has been done and that the suspension and discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Los Angeles, California facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be physically posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 11, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT threaten to take any adverse action against you for supporting the California Federation of Teachers (the Union) or any other union.

WE WILL NOT discharge or discipline you for supporting the Union or any other union.

WE WILL NOT promise you benefits in order to discourage your support of the Union or any other union.

WE WILL NOT tell you not to attend meetings where other employees are discussing terms and conditions of employment, the Union, or any other union.

WE WILL NOT make it appear to you that we are watching to see whether you are involved in efforts or activities in support of the Union, or any other union.

WE WILL NOT disparately and discriminatorily enforce our security policy by evicting union representatives, and requiring management's approval of their visit.

WE WILL NOT promulgate, maintain, or enforce a new security policy in order to discourage your support of the Union or any other union.

WE WILL NOT ask you or order you to get back authorization cards that you signed in support of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind our "Visitor Policy" stated in a March 11, 2010 interoffice memorandum and notify all employees in writing that it is no longer in force.

WE WILL, within 14 days from the date of the Board's Order, offer Brandii Grace full reinstatement to her former job or, if that job no longer exists, to a substantially

equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Brandii Grace whole for any loss of earnings and other benefits resulting from her suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Brandii Grace, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the suspension and discharge will not be used against her in any way.

LA FILM SCHOOL, LLC AND ITS BRANCH LA RECORDING SCHOOL, LLC

Juan Carlos Ochoa Diaz, Esq., for the Acting General Counsel.
Ronald J. Klepetar and *Dawn Kennedy, Esqs. (Baker & Hostetler, LLP),* of Los Angeles, California, for the Respondent.
Lawrence Rosenzweig, Esq., of Santa Monica, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in Los Angeles, California, from January 10 to 13, 2011. The original charge was jointly filed by the California Federation of Teachers (Union) and Brandii Grace, an individual, on March 3, 2010.[1] A consolidated complaint (complaint) issued on September 22,[2] which alleged, inter alia, that the LA Film School, LLC and its branch LA Recording School, LLC (School or Respondent), violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act), by: suspending and then firing Grace; threatening employees with retaliation for their union activities; promising employees benefits in order to discourage their union activities; creating the impression that union activities were under surveillance; instructing employees to rescind their union authorization cards; directing employees to not attend union meetings; and by creating and disparately enforcing access rules in order to impede union activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the School has operated an institution of higher learning in Los Angeles, California, where it maintains its office and place of business. During the 12-month period ending August 31, it derived gross revenues exceeding $1 million, and purchased and received at its Los Angeles, California facility goods valued in excess of $5000 directly from points located outside of California. The School admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The School offers associate degree programs in film, computer animation, video game production, and recording arts.[3] It employs approximately 135 faculty members. The majority of the faculty is employed in the film and recording departments, while the minority, i.e., five instructors, is employed in the game department.

Diana Derycz-Kessler, chief executive officer and president, runs the School. William Smith, vice president of education, reports directly to her and oversees curriculum, faculty, and related matters. At all relevant times, Brian Walker was the human resources director.[4] The film, animation, recording and game departments are each headed by a program director.

Michael Blackledge, program director, was hired in July 2008 to develop the fledgling game department.[5] He recruited Grace, after finding her contact and background information on a business networking website. Grace, who was living in Seattle, Washington, was then employed as a game design instructor at Digipen Institute of Technology. Blackledge was impressed by her academic and professional background, and contacted her via email to gauge her interest in a faculty position. Her subsequent recruitment entailed phone interviews and an in person interview. On August 11, 2009, Grace accepted a faculty position in the game department at an annual salary of $70,000. (R. Exh 1.)

On August 31, 2009, Grace began her employment. She was supervised by Blackledge. Because the Game Design I and II (GD1 and GD2) classes that she was hired to teach were not scheduled to begin until June, she volunteered to teach a Business of Games (BOG) class in October 2009. (R. Exhs. 2–3.)

Grace began teaching BOG in late-October. It was a 32-hour course, which was taught in 8, 4-hour blocks. It covered game development, marketing, testing, and licensing. She prepared a lengthy lesson plan, which divided each day into 15-minute blocks. (R. Exhs. 8, 30.) The lesson plan highlighted discussion points, class materials, equipment, objectives, assessments and assignments. Grace testified that Smith, Blackledge's superior, complemented her lesson plan and only proposed ministerial changes, which were completed. (R. Exh. 9.)

In addition to teaching, Grace assisted with student recruitment. The record failed to reveal that she held the authority to hire, transfer, suspend, lay off, or perform any other supervisory functions. Moreover, she did not exercise any authority

[1] All dates herein are 2010, unless otherwise stated.

[2] At the hearing, counsel for the Acting General Counsel withdrew par. 6(C) of the complaint, which involved a written warning issued to Celina Reising in Case 31–CA–29642.

[3] It consists of four buildings, which are located at: 6353, 6363, and 6690 Sunset Blvd.; and 1605 Ivar Ave.

[4] After the instant events, Walker resigned and accepted a similar job at Bank of America.

[5] The department began accepting students in October 2009.

beyond the academic discretion to design courses and evaluate students.

B. The Union's Organizing Drive.

The Union's campaign was driven by the School's creation of a new faculty pay system.[6] On January 25, Smith announced that the faculty would be reclassified from salaried to hourly employees, who would only be paid for hours taught in the classroom. (GC Exh. 2.) The change reduced wages for all, but the few, who provided 40 weekly hours of classroom instruction.

Grace was blindsided by this news. Within months of relocating from a stable position at an established institution, her full-time salary and benefits were unexpectedly slashed. Her situation was even more sobering because she was only teaching a single course. She did not, however, accept the news submissively and responded by building a coalition of disgruntled colleagues. This coalition gave rise to the Union's organizing drive.

On January 29, Grace and 16 colleagues attended a faculty-only meeting at the School,[7] which focused on concerns regarding the new wage system. Grace and Dominick Koletese, another faculty member, arranged and chaired the meeting. Grace recalled colleagues voicing anger, and lamenting that Walker had already asked some of them to sign new employment contracts reflecting their wage reduction. They ended the meeting by agreeing to temporarily not sign the new contracts, and decided to reconvene, once further research was performed.

On February 1, Grace held another meeting at the School.[8] She informed her colleagues that, after contacting various agencies, she learned that they were at-will employees, who were individually powerless to challenge the new system. She did state, however, that they could collectively protest the change, if they unionized. She recalled the group welcoming her suggestion. She agreed, as a result, to research the issue further.

Grace eventually contacted Union Field Representative Peter Nguyen. On February 2, at Grace's behest, Nguyen lectured 30 faculty members at the School, and explained the unionization process.[9] Grace addressed the audience and advocated unionizing. The meeting resulted in the creation of an organizing committee, which was run by Grace and five others. Grace provided unrebutted testimony that the meeting space was reserved by Ariel Levy, a supervisor, and that he attended and observed this gathering.[10]

On February 11, within less than 2 weeks of the first union meeting, Blackledge and Smith met with Grace and her game faculty colleagues. At this meeting, Smith unexpectedly announced that the game faculty would be returned to salaried positions. He cited their hard work and Blackledge's ongoing praise as his rationale. He explained that their position titles would change from course directors to department chairs.[11] When Grace asked whether the title change included any supervisory duties, Smith stated that it would not.[12]

Shortly after the February 11 meeting ended, Grace met privately with Blackledge. She testified that, after receiving his congratulations, the tenor of their discussion changed. She recalled him: accusing her of leading the faculty "revolt"; warning that, unless she stopped, there would be retaliation; calling her "too lawyerly"; and cautioning her to accept the School's largesse gracefully. During his testimony, Blackledge denied these comments.

Because Grace testified that Blackledge called her the leader of the revolt and threatened her, and Blackledge denied such comments, I must make a credibility resolution. For several reasons, I credit Grace's account. I found her testimony and demeanor to be forthright, consistent, and truthful. I found Blackledge's demeanor less than candid. His testimony was vastly more helpful on direct than cross, which was marked by pauses, spotty recall, and periodic dismay that his integrity was being questioned. I also find it plausible that the School offered Grace a quid pro quo of salaried status in return for ending her union activities, and that Blackledge's threat communicated their offer.

On February 20, Grace met privately with animation department program director, Bobby Milly. She testified that she asked him about a rumor that he had banned the animation faculty from attending union meetings. Grace stated that Milly admitted the ban, and related that his actions were approved by William Heavener, his superior. Because the School, without explanation, failed to call either Milly or Heavener to rebut this testimony, I credit Grace's account, which was forthright and believable. See *Douglas Aircraft Co.*, 308 NLRB 1217 (1992) (failure to call a witness "who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference . . . regarding any factual question on which the witness is likely to have knowledge.").

Later on February 20, Grace and 20 faculty members met with Union Representative Nguyen at the Waffle House.[13] Nguyen collected several signed authorization cards at this meeting. In addition, Grace agreed to solicit signed cards from 12 nonattending faculty members and related that, over the next few days, she acquired seven additional cards.

[6] The School created this policy, following an 80-percent decrease in enrollment.

[7] The meeting was held at 6363 Sunset Blvd. in the 5th floor conference room, which was near Smith's and Program Directors Joseph Byron's and Bobby Milly's offices.

[8] The meeting was held at 6363 Sunset Blvd. in a 4th floor classroom.

[9] This meeting was held at 1605 Ivar Ave. at the Ivar Theater.

[10] See Jt. Ext. 1 (joint stipulation that Levy was a 2(11) supervisor).

[11] Pay records show that Grace's title changed from course director to department chair during the February 14 to 27 pay period, and she retained her original salary. (GC Exhs. 2–3.)

[12] On February 19, Grace met with Walker and asked whether she would receive a new contract, which reflected her promotion. She related that Walker replied that, per Blackledge, the title change was nonsubstantive and she would not receive a new contract.

[13] The Waffle House is one city block from the School.

C. Grace's Warning and Suspension

On February 22, Grace received a warning and 2-day suspension. (GC Exhs. 6–7.)[14] She testified that Blackledge accused her of being combative and turning the game department against him. The discipline was based upon: (1) a December 9, 2009 email and follow up discussion with Blackledge (GC Exh. 8); and (2) her ongoing failure to submit course materials. She was placed on a 60-day probationary period, reclassified back to hourly status, and directed to, "provide Lesson Plans, Course Grid and Syllabi in the proper format for the Business of Games and Game Design I [courses] within 30 days." She stated that she was not allowed to respond to the allegations, and was also told that, effective immediately, she must continuously keep Blackledge apprised of her whereabouts.[15] As will be discussed, I find the reasons behind the warning and suspension to be pretextual.

D. The Union's Petition

On February 24, before Grace returned from her suspension, the Union filed a petition with the Board seeking to represent the faculty. (GC Exh. 19.) The petition alleged that over 30 percent of the faculty supported the Union. By facsimiles dated February 25 and March 1, Derycz-Kessler was notified about the petition. (Jt. Exh. 1, att. A, B.)

E. Grace's Leave Following Her Suspension

Following the suspension, Grace took leave on February 25 and 26. Blackledge, Walker, and Smith stated that, although she had earned the leave, they were disappointed that she was absent at a critical point in her tenure. They did not, however, testify that they denied her leave request, or ordered her to immediately return. Grace explained that she took leave because she feared that her firing was imminent and needed time to move in with a family member in order to prepare for her probable loss of income.

F. Grace's Termination

On March 1, Grace returned to work; on March 2, she was fired. Her separation notice cited insubordination, "recurring verbally combative and aggressive behavior," and "refusal to complete course documentation." (Jt. Exh. 1, att. C.) The School's witnesses cited her December 9, 2009 and February 15 emails, insubordinate followup discussions with Blackledge, and ongoing failure to submit materials as examples of her misconduct. They related that, when she failed to submit course materials on March 1, her discharge became their only option. Walker indicated that the School has fired other employees for absenteeism, performance, and insubordination. (R. Exhs. 26–29.)

Derycz-Kessler, Smith, Blackledge and Walker denied knowing about the union campaign or Grace's connected activities, when she was fired. They, instead, claimed that they first learned about these activities a few hours after her firing. I do not credit their testimony. First, Blackledge knew about the campaign when he threatened Grace. Likewise, Milly, another supervisor, knew about the campaign when he banned the animation faculty from attending union meetings. Levy, another supervisor, also arranged and observed a union meeting on February 2. I find it likely that these supervisors told their superiors about the campaign and Grace's role. Second, I find it improbable that Derycz-Kessler, who was faxed notices about the petition on February 25 and March 1, was not made immediately aware of this key personnel issue. Third, given that Grace held several union meetings at the School within close proximity to Smith's and Milly's offices, I find it doubtful that the School did not contemporaneously learn about some, or all, of these meetings. Accordingly, I find that the School knew about the union organizing campaign and Grace's role when she was fired.

G. December 9, 2009 Email and Meeting with Blackledge

As noted, the School alleged that Grace's firing was largely based on a December 9, 2009 email and followup discussion with Blackledge. In response to an email from Blackledge regarding a candidate for an applied math and logic faculty position in the game department, Grace emailed this reply to Blackledge:[16]

> He has **ZERO** game experience—his resume doesn't even mention games. I would say he is entirely unqualified.
> I am happy he would like to explore . . . games. I would highly encourage him to apply again in the future **after** he completes his study of them . . . .
> Michael: This is an APPLIED class. The entire point is to teach students how to APPLY math, logic and physics concepts AS THEY APPLY TO GAME PROGRAMMING. . . .
> The class **cannot** be taught by someone who has **no knowledge** of how these subjects are practically applied in game development!!!. . . .

(GC Exh. 8 (emphasis as in original).)

Grace testified that, after sending the email, she grew concerned that it might be misconstrued as something other than a candid critique. She stated that, in order to avoid a misunderstanding, she met with Blackledge shortly after sending the email and explained her intentions. She recollected that he had not yet read the e-mail, appeared comfortable with her explanation, and proceeded to discuss the candidate's qualifications. She related that she was respectful, discussed the position's duties, and reviewed another applicant's resume with him. She stated that the meeting ended cordially, and the issue appeared to be resolved.

On December 10, Blackledge sent the following email to Grace:

> [I]n the future, I'm asking that you come to me in person instead of sending heated e-mails of this nature. It can affect to moral [sic] of the dept. and reflect poorly on your professionalism. E-mail is a tool for sharing information, it does not convey emotion.

[14] GC Exh. 7 is incorrectly dated January 22, instead of February 22. Although the exhibit does not describe a suspension, it is undisputed that Grace received a 2-day suspension at this meeting.

[15] Blackledge acknowledged this statement.

[16] This email was also sent to three video game department faculty members.

(R. Exh. 10.) Grace indicated that she and Blackledge did not discuss the matter further, until it was raised in connection with her suspension and firing.

Blackledge testified, on the other hand, that Grace's email was disrespectful. He related that her disrespect was magnified when she copied her email to three game faculty members. He recalled that Grace stopped by his office after sending the e-mail, half-heartedly apologized and proceeded to hostilely question his understanding of the position. He indicated that she screamed and berated him, and left him with no alternative, other than to ask her to leave. He asserted that she was so hostile that he grew concerned that the altercation would escalate, if not abruptly halted. He averred that Grace initially refused to leave his office; but, eventually calmed down and obliged after reviewing a more qualified applicant's resume. He indicated that he immediately reported her rant to Walker. He did not, however, explain why, given the seriousness of his account, he failed to take immediate disciplinary action, instead of silently waiting 3 months to raise this matter.

Because Blackledge testified that Grace engaged in an aggressive tirade, and Grace denied such action, I must make a credibility determination in order to resolve this contradiction. Once again, I credit Grace's account. As stated, I credit her demeanor over Blackledge's. In addition, I find it probable that, if Grace actually engaged in the aggressive outburst that Blackledge alleged, she would have been promptly disciplined or fired. I find Blackledge's account inconsistent with his mild followup email, which only asked Grace to speak to him personally in the future and conspicuously failed to cite her alleged outburst. It seems obvious that most supervisors would consider an assault worse than an undiplomatic email, and would promptly document and address such behavior.

H. February 15 Email and Submission of Course Materials

The School contended that its decision to fire Grace was also largely based on her refusal to submit adequate course materials for the BOG, GD1, and GD2 courses. Blackledge testified that her BOG lesson plans lacked: sufficient detail, copies of quizzes and exams, power point presentations, and syllabi. He asserted that Grace was continuously unwilling to correct deficiencies.

Grace, on the other hand, testified that her BOG course outlines from October 2009 were approved by both Blackledge and Smith. She noted that she met with Smith to discuss these materials and he solely suggested minor revisions, which were completed. (R. Exh. 9.) She related that Blackledge made de minimis changes to her October 2009 materials, which were completed. She contended that, once she attempted to unionize the faculty, her work product became unacceptable, and the same BOG course materials that passed muster in October 2009 were rejected, when she prepared to reteach the course in March.

The parties offered numerous email exhibits regarding course materials. One set of emails occurred before January 25, i.e., the onset of Grace's Union activity, while the other set occurred thereafter. This distinction is quite telling; inasmuch as the preunion activity emails are either positive or neutral, while the postunion activity emails are consistently critical.

The preunion activity emails, as noted, were generally positive. (See, e.g., GC Exh. 16 ("thanks for your work on BOG this week."); R. Exh. 30 (Blackledge's email to Smith enclosing BOG course materials with the praise, "[s]he put these together in record time. . . ."); R Exh. 9 (asking Grace to "consolidate . . . lesson plans into a single doc [and] . . . make the changes that Bill . . . discussed related to segment times . . ." but, conspicuously failing to describe any substantive problems).)[17]

The postunion activity emails were, however, critical. For instance, on February 15, Blackledge and Grace had the following exchange concerning the March BOG course:

> [GRACE] Here is the updated March BOG course outline. . . .
>
> [BLACKLEDGE] [T]his is a great start, but you'll need to use the standard formatting. Again, I need the lesson plan, course grid and syllabus (if updated). . . .
>
> [GRACE] This is the same accepted format as the grid I handed in last time. I changed the course content, not the format.
>
> [BLACKLEDGE] I'm asking you to use the standard format from now on, for all courses. I let it slide last time due to time constraints.[18]

(GC. Exh. 10; see also R. Exh. 14.) By way of further example, on February 15, Grace sent Blackledge a multiple page email covering various accreditation issues, including student attendance, student terminations, graduation issues, and a host of other matters. (GC Exh. 11.) A relatively minor portion of this email discussed lesson plans:

> There is NO [accreditation] requirement for documentation such as "Course Grids" or "Lesson Plans". A syllabus and the course catalog are all that is necessary to cover all required course information.

Even though this communication was solely informational, it was construed by Blackledge to be insubordinate. (See R. Exh. 19) ("[a]fter reading the email from Brandii, it was clear to me that she was shrewdly attempting to refuse my request [to submit BOG course materials] on the basis that it was not a requirement by the ACCSC.").

Blackledge testified that he was upset about Grace's February 15 email, and thought that she was again refusing to provide course materials. He expressed concern that Grace, who was not an accreditation expert, was conveying inaccurate information. He reported that, following the email, Grace dropped by his office and engaged in another a hostile dialogue, which included these comments:

> Can I complete the course materials? Yes. Will I is another question?

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[17] The remainder of the preunion activity emails either requested minor procedural action or described procedures. (See, e.g., GC Exhs. 18, 26; R. Exhs. 5, 6, 12, 13.)

[18] It is noteworthy, however, that Blackledge failed to define what he meant by "standard formatting," or explain how her previously submitted, accepted material should be amended.

> If Bill Smith asked me to dress up in a chicken suit and come to work, can I? Yes, but, will I is another question?

(See also R. Exh. 19.)

Grace, on the other hand, acknowledged stopping by Blackledge's office to discuss the email, but, denied using any sarcasm, acting hostilely, or refusing to provide course materials. She added that there was an ongoing debate amongst the faculty regarding whether course grids and lesson plans were required for accreditation. She stated that her email solely attempted to respond to this debate, as well as a number of other, unrelated accreditation issues.

Because Blackledge testified that Grace engaged in another hostile tirade on February 15, and Grace denied such conduct, I must make another credibility determination. I credit Grace's testimony over Blackledge's for the same host of reasons previously discussed.

I. Postdischarge Discovery that Grace's Laptop was Damaged

The School contended that, even assuming arguendo that it lacked legitimate cause to terminate Grace on March 2, it possessed such cause after it made its posttermination discovery that she intentionally damaged her laptop by removing its partition, operating system, software, and files. Grace testified that she did not return her laptop at the March 2 termination meeting because it was at her home residence. She indicated that her mother returned the laptop to the School on her behalf on March 3.

Denny Trujillo, director of the information technology department, testified that he received Grace's laptop about 4 to 5 days after her termination, i.e., March 6 or 7. He recalled Diana Reneau from human resources bringing it to his office. He explained that faculty laptops are equipped with an operating system and various software applications. He noted the following problem with Grace's laptop:

> It appeared that no operating system and no partition existed on the laptop. It booted with a black screen.

He concluded that someone intentionally deleted the partition because this action involves several deliberate steps. He stated that a computer virus cannot cause a deleted partition. He added that, due to the deleted partition, the laptop lacked an operating system, software and files. He indicated that the laptop was not physically damaged and became operational, once a new partition, operating system and software were reinstalled. He was unable to determine when the partition was removed, or identify who he suspected might have removed the partition.

Grace denied causing the damage at issue. Blackledge denied having any contact with Grace's laptop following her termination.

J. Union Access Issues

On March 9, Union Representative Nguyen visited the School to accompany Reising, a member of the Union's organizing team, to a possible disciplinary meeting. He related that he passed by security without obtaining a visitors' badge and met with Reising and several faculty members.[19] While they waited for Reising's meeting to begin, Smith arrived and questioned why they were there. Nguyen identified himself and told Smith that they were there to protect Reising's *Weingarten* rights and accompany her to the meeting. Smith replied that Reising could not bring a representative and departed. Nguyen related that, even though the group waited peacefully for Reising and was not disruptive, Smith continued to monitor them and question their presence. After Reising's meeting ended, the group walked over to her office in an adjacent building to discuss her encounter.

Nguyen indicated that he passed by the security kiosk without issue, while someone in his party indentified him as a visitor. Within a few minutes of entering Reising's office, a security guard appeared and escorted Nguyen to the lobby, where he was told to leave. He testified that he initially refused and explained that he was a faculty guest who was acting appropriately. He asked for an explanation, which was declined. At some point, four other security officers arrived. They insisted that he depart, reminded him that he was on private property, explained that Smith had ordered his ejection and threatened physical force.[20] He eventually relented and departed. He added that he previously visited the School without issue.

At the time of Nguyen's ejection, the School had the following visitors' policy:

> **VISITORS seeking access for Faculty, Staff and/or Employees of L.A. Film, security procedures are as follows:**
>
> 1) All VISITORS are required to provide their name and destination to the Security Officer.
>
> 2) Security Officers are to check a photo identification of the VISITOR (Driver's License; etc.) and ensure that the name on the ID matches the name the VISITOR has provided.
>
> 3) Officers shall call the staff member the Visitor is to see—Officers shall provide the name of the Visitor to the staff member. (If you are unable to contact the staff member, Officers are to politely request the VISITOR to stand by for a few minutes until the staff member is contacted.
>
> 4) If the Visitor is authorized, Officers shall record the information in the VISITOR LOG. (Name, Destination, Time In & Out). (If the Visitor is not authorized, Officers shall politely inform the visitor that they do not have an appointment scheduled, therefore they cannot proceed.)
>
> 5) Officers shall then record the individual's name on the Visitor Badge and inform the visitor that the Visitor Badge must be worn at all time while on premises. . . .
>
> Any Security Officer that observes an individual on the property without a visitor badge **MUST** confront the individual and ask them how they can assist them. Officers are to use courtesy when confronting individuals as most people have legitimate reasons for entering the facility.
>
> If the individual is authorized to be on the premises, the guard shall escort the individual to the Building One Lobby Officer

[19] He identified Reising, Tema Levine Staig, and Barbara Dunphy.

[20] Nguyen's expulsion generated multiple incident reports. (GC Exh. 22.)

> or the 3rd Level Office to obtain a new Visitor Badge. Unauthorized individuals shall be escorted to the exit.

(GC Exh. 20 (emphasis as in the original).)

On March 10, following Nguyen's ejection, the School issued a written security alert, which placed its security force on "high alert" for Nguyen, and directed them to bar him from entering the School. (GC Exh. 21.) This alert contained a detailed description of his physical appearance and identified him as a union representative. The School's witnesses failed to explain the School's basis for issuing this alert.

On March 11, Pat Olmstead, vice president of operations and facilities, issued this memorandum:

> We have had a rash of thefts over the last few weeks. Students and staff have voiced their concerns. . . .
>
> Another issue we're facing is knowing who and who isn't permitted on campus. With the increased activity this has become more difficult for our security team. . . ." In our continuing efforts to keep the premises safe we are instituting new visitor policies.
>
> - Employees' visitors must be cleared by their department head. A valid reason must be given for the visit.
> - Once cleared, all visitors must be reported via phone or e-mail to the reception desk prior to their arrival.
> - Visitors must only enter the buildings through the Main Sunset Blvd. entrances . . . and sign in with security.
> - Visitors not on the reception list will be delayed until cleared by the department head.
> - All guest speakers must be approved by Bill Smith prior to scheduling.
> - No visitors are permitted at the Ivar Theater. Employees and students only. Employees wishing to take visitors to Ivar must be accompanied by security. . . .

(Jt. Exh. 1, att. D.)

Olmstead testified that the School houses valuable computer, film and recording systems. He related that, generally, visitors who fail to check in with security, are not automatically expelled, as long as they're conducting legitimate business. He added that he would normally "defer to the instructor," whom the person was visiting, before seeking expulsion. He reiterated that the new policy addressed the recent rash of thefts.

Tema Levine Staig, a faculty member, testified that on at least five prior occasions, her guests visited the School without hindrance. (See also GC Exhs. 23–24.) She related that the School never previously required management preapproval for visitors.

Smith testified that he met privately with Reising on March 9 and saw no reason for Nguyen to participate. He acknowledged calling security and ordering Nguyen's expulsion.

K. Revocation of Authorization Cards

On March 12 and 22, Derycz-Kessler emailed the faculty a sample card revocation letter, which was addressed to Union Representative Nguyen:

> I recently signed a union authorization card for your union. This letter is to notify you that I am revoking my authorization, want to withdraw from membership in your union and am requesting that you return my authorization card to me. . . .

(Jt. Exh. 1, att. E–F.) The above-described letter was attached to an election questions and answers memorandum. (See R. Exh. 17.)

L. Milly's Disavowal Memorandum

On April 29, Milly issued the following memorandum to the animation department faculty:

> I would like to clear up a misunderstanding about a statement I made to the team back in February of this year.
>
> My statement pertained to the memo regarding a change in faculty status from salary to hourly. Before the release of the memo, I had a discussion with our team where I suggested that we deal with this change within our own department. . . .
>
> Due to issues with this change, Faculty from other departments arranged to meet and discuss this change in status, and invited members of Computer Animation to attend. As we had dealt with this issue internally, I did not want the team to become involved in other departments' policies and politics.
>
> This statement was misinterpreted by others to mean that I did not want the team to become involved in union related activities. This was not true, because at the time I was not aware that people were meeting to propose organizing the faculty in a union. I respect any faculty members' right to participate in organizing activities or the right to refrain from such activities.

(Jt. Exh. 1, att. G.)

III. ANALYSIS

A. Independent 8(a)(1) Allegations

1. Blackledge's threat

The School violated Section 8(a)(1) of the Act, when Blackledge threatened Grace with retaliation for engaging in union activities on February 11.[21] A statement is an unlawful threat under Section 8(a)(1), when it interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a). In evaluating such statements, the Board:

> [D]oes not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act.

Sage Dining Service, 312 NLRB 845, 846 (1993); see also *Empire State Weeklies, Inc.*, 354 NLRB 815, 817 (2009) (totali-

[21] This allegation is listed in par. 8 of the complaint.

ty of circumstances standard); *Double D Construction Group*, 339 NLRB 303 (2003) ("test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction").

On February 11, Blackledge told Grace that he knew that she was leading the "revolt" and warned her that, unless she stopped, retaliation would ensue. He also told Grace to stop being "too lawyerly," and urged her to accept her reclassification without protest. Under the circumstances, a reasonable employee in Grace's position would consider these statements to be a threat to either stop engaging in Union activities, or suffer unspecified reprisals. As a result, Blackledge's comments violated Section 8(a)(1).

2. Reclassification of the game faculty

Smith violated Section 8(a)(1), when he offered the game faculty reclassification to salaried positions on February 11.[22] Absent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer an improper motive and find interference with employee rights under the Act. *KOFY TV-20*, 332 NLRB 771, 773 (2000). A legitimate business reason may be established by showing that the benefits were granted in accordance with a preexisting established program. Id.

Smith's actions were unlawfully designed to interfere with employees' Section 7 rights. First, the decision to change the entire faculty from salaried to hourly positions was the seminal issue behind the Union's campaign. I find that the School reclassified the game faculty in order to placate Grace, the lead organizer, regarding her own wage issue, and coax her to abandon her organizing efforts. This finding is supported by Blackledge's retaliatory threat. Second, the timing of the game faculty's reclassification is suspect. Within 17 days of the start of the Union's campaign, the School decided to return the five-person game faculty to salaried status, while ignoring the legitimate interests of its remaining 130 faculty members. Third, the School's decision to reclassify the game faculty occurred in the context of the several ULPs described herein. Lastly, the School's asserted reasons for reclassifying the game faculty are pretextual, i.e., their strong work and Blackledge's praise. All of these reasons, however, existed when the School created its wage policy only 17 days earlier, and could have been addressed at that time. It is improbable that the School would have overruled a carefully planned wage decision, and risked greater faculty disaffection by rewarding only five new faculty members, unless it had a strong reason, i.e., stifling the organizing drive. I find it probable that the School previously considered the game faculty's hard work and Blackledge's praise before it announced its wage decision, and initially dismissed such considerations. Accordingly, Smith violated Section 8(a)(1) when he reclassified the game faculty.

3. Milly's order

The School violated Section 8(a)(1), when Milly directed the animation faculty to not attend union meetings.[23] It is unlawful for employers to direct employees to not attend union meetings. See, e.g., *Hanson Aggregates Central*, 337 NLRB 870, 875–876 (2002).

The School contends that, even if Milly's statements were unlawful, his April 29 disavowal memo self-remedied any violation. In order for an employer to self-remedy a violation of the Act, it must meet the test set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), which provides that repudiation must be: timely, unambiguous, specifically refer to the unlawful conduct, broadly published, and unaccompanied by other violations. In *Holly Farms*, 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1360 (4th Cir. 1994), the Board held that the employer must also admit the wrongdoing.

I find that the School has not met the *Passavant* test. Although reasonably timely, Milly's repudiation was ambiguous, not broadly published and failed to admit wrongdoing. Moreover, the unlawful statement was accompanied by the several other unremedied ULPs at issue herein.

4. Impressions of surveillance

The School created an unlawful impression of surveillance, when: Blackledge told Grace that he knew that she was the leader of the revolt on February 11; Blackledge told Grace to keep him informed of her whereabouts at all times on February 22, and accused her of turning the game faculty against him; and Milly directed the animation faculty to not attend union meetings.[24] The test for whether an employer creates an unlawful impression of surveillance is whether, under the circumstances, an employee could reasonably conclude that their union activities are being monitored. *Rogers Electric, Inc.*, 346 NLRB 508, 509 (2006).

Under the circumstances, a reasonable employee would construe the above-described statements, i.e., you're the leader of the "revolt," keep me informed of your "whereabouts," you've turned the game faculty against me, and do not attend union meetings, to mean that their union activities were being closely monitored. Thus, such statements violated Section 8(a)(1).

5. Nguyen's expulsion

I find that the School violated Section 8(a)(1), when it expelled union organizer Nguyen on March 9.[25] In *Register-Guard*, 351 NLRB 1110 (2007), the Board held:

> [A]n employer violates 8(a)(1) of the Act by prohibiting nonemployee distribution of union literature if its actions "discriminate against the union by allowing other distribution." After determining that the employer's decision to deny the union access was based "solely on the Union's status as a labor organization and its desire to engage in labor-related speech," the Board [has] found . . . that "[s]uch discriminatory exclusion" violated Section 8(a)(1).
>
> Similarly, . . . the Board [has] found that the employer violated Section 8(a)(1) by sending employees a message stating that "it is not appropriate for union literature to be . . . placed in our breakroom." The Board found that the message was discriminatory, and therefore unlawful, because it "barred on-

[22] This allegation is listed in par. 9 of the complaint.
[23] This allegation is listed in par. 10 of the complaint.
[24] These allegations are listed in pars. 7 and 11 of the complaint.
[25] This allegation is listed in par. 12 of the complaint.

> ly union literature, and no other, from being placed in the breakroom." . . .
>
> We therefore [hold] . . . that unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status . . . .

Id. at 1118–1119 (citations and footnotes omitted). In applying the latter standard, the Board has found that an employer violates Section 8(a)(1), when it discriminatorily adds additional, unwritten, restrictions to an otherwise lawful access policy in order to prevent union-related access or speech. See, e.g., *Hawaii Tribune-Herald*, 356 NLRB 661, 688–689 (2011) (employer violated Sec. 8(a)(1) when it required union representatives to obtain management approval for visits, even though its written security policy permitted all visitors to enter the facility without prior management approval); *Register-Guard*, supra, 351 NLRB at 1119 (employer violated Sec. 8(a)(1) when it prohibited union emails that were informational, nonsolicitations, even though written policy "prohibited only 'nonjob-related solicitations,' not all nonjob-related communications.").

I find that the School violated Section 8(a)(1) when it ejected Nguyen. The applicable security policy did not grant management the right to approve faculty visitors; it solely required faculty approval. (GC Exh. 20.) The policy provided that, in the event that an authorized visitor failed to initially check in with security, they should be escorted to the lobby, issued a visitor's badge and permitted to return to their destination. Even though Smith knew that Nguyen's visit was approved by the faculty and he was not causing a disturbance, he pursued his eviction after learning that he was a union representative. Moreover, Levine Staig testified that the School never previously required management preapproval for visitors. It is noteworthy that the School felt so strongly about banning Nguyen from its facility that it issued a security alert the day after his eviction, which appeared to ban him in perpetuity. (GC Exh. 21.) Accordingly, Nguyen's eviction violated Section 8(a)(1). See *Hawaii Tribune-Herald*, supra.

6. The new security policy

I find that the School violated Section 8(a)(1) when it promulgated and maintained a new security policy on March 11, which required that visitors receive management approval before being granted access.[26] As a threshold matter, I note that counsel for the Acting General Counsel and the Union have not contended that the new security policy is unlawful on its face; they have solely asserted that its timing was unlawful.

It is settled law that an otherwise valid no-solicitation, no-distribution rule violates the Act, when it is promulgated to interfere with employees' rights to self-organization, rather than to maintain production and discipline. *Cannondale Corp*., 310 NLRB 845 (1993); *Harry M. Stevens Services*, 277 NLRB 276 (1985). In the instant case, the School's new security policy was imposed only 2 days after Nguyen's unlawful eviction and in tandem with an array of other ULPs. I find, as a result, that the new security policy was unlawfully timed and designed to interfere with the faculty's Section 7 rights.

7. Withdrawal of union authorization cards

The School violated Section 8(a)(1), when Derycz-Kessler assisted the faculty with the withdrawal of their union authorization cards on March 12 and 22.[27] In *Mohawk Industries*, the Board held:

> [A]s a general rule, an employer may not solicit employees to revoke their authorization cards. An employer may, however, advise employees that they may revoke their authorization cards, so long as the employer neither offers assistance in doing so or seeks to monitor whether employees do so nor otherwise creates an atmosphere wherein employees would tend to feel peril in refraining from revoking. Thus, an employer may not offer assistance to employees in revoking authorization cards in the context of other contemporaneous ULPs.

334 NLRB 1170, 1170–1171 (2001) (citations omitted).

Derycz-Kessler's assisted the faculty with the revocation of their authorization cards in tandem with the commission of several ULPs.[28] Thus, such aid was unlawful.

B. Grace's Suspension and Firing

I find that the School violated Section 8(a)(1) and (3), when it suspended and terminated Grace.[29] The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing that the employee's protected conduct motivated the adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected that she engaged in such conduct, and the employer harbored animus and took action because of such animus.

Under the *Wright Line* framework, if the General Counsel makes a prima facie showing, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. Once this is established, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action, even in absence of the protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action

[26] This allegation is listed in par. 13 of the complaint.

[27] This allegation is listed in par. 14 of the complaint.

[28] I also note that Derycz-Kessler simultaneously requested employees to report whether they had been harassed by coworkers pressuring them to sign cards (see Jt. Exh. 1, atts. E-F; R. Exh. 17), which was also unlawful. See *Eastern Maine Medical Center*, 277 NLRB 1374, 1375 (1985) (statement by an employer urging employees to report being harassed or pressured into signing cards is overly broad and unlawful, inasmuch as such statements encourage employees to identify pro-union solicitors).

[29] These allegations are listed in par. 6 of the complaint.

would have taken place even in the absence of the protected conduct." *Serrano Painting*, 332 NLRB 1363, 1366 (2000). If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for its actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

1. Union activity

Grace engaged in extensive union activity. She organized and held multiple union meetings at the School. She researched unionizing, introduced the Union to the faculty, advocated unionizing at faculty meetings, served on the Union's organizing committee, and secured signed authorization cards from the faculty. Her efforts resulted in the Union filing a petition with the Board on February 24, within a month of her first meeting.

2. Knowledge

The School was aware of Grace's activity. Levy, a supervisor, set up and observed a significant union meeting; Blackledge told Grace that she was the leader of the "revolt" and threatened retaliation; and Milly told the animation faculty to not attend union meetings. See *State Plaza, Inc.*, 347 NLRB 755, 756–757 (2006) (supervisor's knowledge of union activities is imputed to the employer unless credited testimony establishes the contrary); *Dobbs International Services*, 335 NLRB 972, 973 (2001); *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983). In addition, Smith reclassified the game faculty in order to induce Grace to stop her union activities. By facsimiles dated February 25 and March 1, the Board advised Derycz-Kessler about the Union's petition. Lastly, as stated, although Blackledge, Smith, Walker, and Derycz-Kessler each denied knowing about the organizing drive or Grace's union activities until after her firing, I do not credit this testimony.

3. Union animus caused the adverse action

The School harbored significant union animus, and suspended and later fired Grace due to such animus. The union animus, which caused Grace's suspension and firing, included Blackledge's retaliatory threat and accusation that she was turning the game faculty against him, Smith offering the game faculty salaried positions in order to repress the organizing drive, Milly's order to the animation faculty to not attend union meetings, unlawful surveillance, Nguyen's expulsion, the unlawful implementation of the new access policy, and Derycz-Kessler assisting faculty with the withdrawal of their authorization cards. Animus and causation are further demonstrated by the close timing between Grace's discipline and her union activities. Specifically, she was: suspended within 11 days of, and fired within 19 days of, Blackledge's retaliatory threat; fired within 4 workdays of the filing of the Union's petition; and fired within 35 days of the start of her organizing activity. See *State Plaza, Inc.*, supra, 347 NLRB at 756 (adverse action occurring shortly after an employee has engaged in protected activity raises an inference of unlawful motive); *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003). Animus and causation are further demonstrated by the School's continuous reduction of Grace's deadline for submitting BOG course materials, i.e., the deadline inexplicably shrunk from 30 days on February 22 (GC Exh. 7), to 7 days on February 28 (R. Exh. 21), to being immediate on March 1 (Blackledge testimony). The School's unwillingness to afford Grace the promised rehabilitation period demonstrates animus. Animus is also shown by the shifting reasons provided for the termination. Even though her suspension and termination notices did not cite attendance problems (see GC Exh. 7; Jt. Exh. 1, att. C), the School repeatedly asserted at the hearing that she was also fired for attendance issues.[30] See *Approved Electric Corp.*, 356 NLRB 238 (2010) (nondiscriminatory reasons for discharge offered at the hearing were found to be pretextual, where different from those set forth in the discharge letters). Lastly, animus is strongly demonstrated by the fact that Grace's suspension evolved into a termination within less than 2 working days of returning from her suspension, even though there were no intervening events during this period that warranted termination. The only seminal event that occurred between the suspension and discharge was the filing of the Union's petition. Moreover, by email dated February 28, even Smith, one of the School's key decisionmakers, opined that terminating Grace within days of her suspension was unfair. (R. Exh. 22.) ("It seems to me that letting her go now without a chance to change the unacceptable behavior would be somewhat unfair and put us in a compromising position.")

4. Prima facie case under *Wright Line*

I find that counsel for the Acting General Counsel has proven that: Grace engaged in union activity; the School was aware of such activity; and union animus triggered her suspension and firing. Accordingly, I find that he has met his initial burden of persuasion under *Wright Line*. I will now consider the School's asserted discharge reasons.

5. Pretextual discharge reasons

I find that the School's explanation for suspending and firing Grace is pretextual. It cited the following events: her December 9, 2009 email and followup meeting; her February 9 e-mail and follow up meeting; and her ongoing failure to submit course materials and lesson plans.

Regarding Grace's December 9, 2009 email and followup meeting, I find that these events do not support her discharge. First, regarding the email itself, I do not find that her usage of capitalizing, bolding, italicizing, underlining, limited sarcasm and exclamation points warranted discipline. Her comments, while less than diplomatic, did not constitute insubordination, and conveyed legitimate opinion about a candidate's qualifica-

[30] Walker admitted that Grace was free to utilize earned sick leave. Moreover, her pay records demonstrate that, prior to her termination, she had a balance of 24 hours of sick leave and 72 hours of annual leave. (GC Exh. 4.) These balances do not support the School's claim that Grace had attendance issues.

tions. Her statements were made to a supervisor and fellow faculty in an academic setting, where one would assume that ideas could be honestly debated without the fear of discipline. I find it hard to believe that, absent Grace's union activity, a School that regularly deals in controversial mediums, such as film, would be so distraught by the choice of font in a rather insignificant email. Second, as noted, regarding the December 9, 2009 followup meeting, I do not credit Blackledge's claim that Grace behaved like a raving lunatic, and found that their exchange was peaceful. Third, if the School truly found her email and followup meeting as offensive as alleged, it would have immediately disciplined or fired her, instead of waiting 3 months to dredge up a dormant matter. I find, therefore, that the School's reliance on Grace's December 9, 2009 email and conduct during the followup meeting were pretextual discharge reasons.

Concerning Grace's February 9 email and followup meeting, and failure to submit BOG materials, I find that these allegations are also pretextual discharge reasons. First, contrary to the School's assertion, Grace's February 9 email was not a refusal to provide course materials. It solely appeared to be informational and regarded a host of accreditation issues, of which only a small portion had any connection to course materials. Second, as noted, I did not credit Blackledge's testimony that Grace engaged in a tirade at their followup meeting. Third, the School failed to prove that Grace's BOG materials were deficient. It accepted her BOG materials in October 2009, prior to her union activity, and then rejected essentially the same materials in March, following her union activity. Moreover, in October 2009. Blackledge complimented her materials (R. Exh. 30), Smith made only minor revisions (R. Exh. 9), and she was permitted to teach the course with these materials. The School failed to present any evidence that the October 2009 BOG course was unsuccessful, students were dissatisfied, or the overall learning experience suffered. The School conspicuously failed to provide lesson plans prepared by other game faculty members, which could concretely demonstrate how Grace's lesson plans were deficient. It solely provided a lesson plan for a film course (i.e., a seemingly different discipline) as a model (R. Exh. 6), which appeared, upon review, to be sufficiently comparable to Grace's BOG lesson plan (R. Exhs. 8, 14, 30). Ironically, the School's model lesson plan for the film course noticeably lacked many of the same things that Blackledge found so intolerable with Grace's BOG materials, i.e., it also lacked quizzes, exams and power point presentations. Lastly, the Schools witnesses spoke almost exclusively in generalities regarding how Grace's lesson plans were insufficient, and failed to offer greater explanation beyond repeating that it lacked quizzes, exams, and power point presentations.[31] Moreover, the email evidence also failed to specifically cite exactly what was wrong with her lesson plans. Accordingly, I find that Grace's February 9 email, followup discussion, and submission of BOG course materials were pretextual discharge reasons.

Based on my above analysis of the School's discharge reasons, as well as my consideration of the many factors that led me to find express and inferred animus, and knowledge, I conclude that its proffered reasons were mere pretexts and that antiunion animus motivated the School's actions. Accordingly, no further analysis of its defenses is necessary for, as the Board stated in *Rood Trucking Co.*, 342 NLRB 895, 898 (2004):

> A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. This is because where "the evidence establishes that the reasons given for the Respondent's actions are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). . . .

6. After-acquired evidence of misconduct

The School contends that, even assuming arguendo, Grace was unlawfully discharged, she is precluded from seeking reinstatement or full backpay on the basis of after-acquired evidence of misconduct. It avers that she intentionally damaged her laptop by removing the partition, operating system, software and files. I find that this argument lacks merit.

In *John Cuneo, Inc.*, 298 NLRB 856 (1990), the Board held that, if an employer shows that an employee engaged in misconduct for which it would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that it first learned of the misconduct.[32] In *C-Town*, 281 NLRB 458, 458 (1986), the Board noted:

> [N]ot every impropriety deprives the offending employee of the protection of the Act. The Board looks at the nature of the misconduct and denies reinstatement in those flagrant cases "in which the misconduct is violent or of such a character as to render the employees unfit for further service." [Citations omitted].

I find that the School has failed to meet its burden of proving that Grace caused the laptop's damage. Trujillo, who was a very credible witness, stated that he could not estimate when the damage occurred, and failed to opine who caused it. He indicated that his office did not receive the laptop until March 6 or 7, even though it was returned to the School on March 3. In presenting its case, the School wholly failed to account for this critical 3 or 4-day gap, by adducing a chain of custody, or otherwise explaining why someone would have mysteriously held on to the laptop for such a long period before bringing it to Trujillo. As a result, although I find that it is possible that Grace might have caused the damage out of frustration over her circumstances, I also find that it is just as likely that someone at the School could have caused the damage after she returned the

[31] I found this point somewhat deceptive, given that Blackledge never contended that Grace did not actually administer exams and quizzes to her BOG students.

[32] See, e.g., *First Transit, Inc.*, 350 NLRB 825, 828–830 (2007) (employee lied on employment application about a 2d degree robbery conviction); *Hadco Aluminum & Metal Corp.*, 331 NLRB 518 (2000) (serious threats of violence); *Alto-Shoom, Inc.*, 307 NLRB 1466, 1467 (1992) (threats made to induce witnesses to testify in a certain manner).

laptop in order to buttress her firing, or erase potentially exculpatory evidence.[33] Accordingly, given that the School retained the burden of proof on this issue, I find that it failed to prove that Grace engaged in misconduct.[34]

7. Supervisory status

Although the School asserted in its answer that Grace was a supervisor within the meaning of Section 2(11) of the Act and, as such, lacked the Act's protection, I find that this affirmative defense lacks merit. The School failed to adduce any evidence of supervisory status at the hearing or even raise this issue in its posthearing brief. Moreover, the record fails to reveal any evidence that Grace was supervisory. There is no evidence that she held the authority to hire, fire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly direct, or resolve grievances, or effectively recommend such actions, in her capacity as either a course director or department chair.

CONCLUSIONS OF LAW

1. The School is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The School violated Section 8(a)(1) of the Act by

a) Threatening employees with unspecified retaliation, if they engaged in union or other protected concerted activities;

b) Promising employees benefits, in order to discourage their support of the Union;

c) Instructing employees not to attend meetings where others were discussing terms and conditions of employment and the Union;

d) Creating an impression that union activities were under surveillance;

e) Disparately and discriminatorily enforcing its security policy by evicting union representatives, and requiring management's approval for their visit.

f) Promulgating, maintaining, or enforcing a new security policy in order to discourage union activities; and

g) Helping employees withdraw their union authorization cards.

4. The School violated Section 8(a)(3) and (1) of the Act by suspending, and then terminating, Grace, because she engaged in union or other protected concerted activities.

5. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the School has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The School, having unlawfully terminated its employee, Brandii Grace, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from the date of her discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The School shall also be ordered to expunge from its records any reference to her unlawful termination, give her written notice of such expunction and inform her that its unlawful conduct will not be used against her as a basis for any future personnel-related actions. The School is also ordered to distribute appropriate remedial notices electronically via email to its faculty, in addition to the traditional, physical posting of paper notices on a bulletin board. See *J. Picini Flooring*, 356 NLRB 11 (2010).

[Recommended Order omitted from publication.]

[33] Moreover, although Blackledge denied possession of the laptop following Grace's firing, I do not, for all of the reasons previously stated, credit his testimony.

[34] Even assuming arguendo that the School proved that Grace damaged the laptop, which it did not, I find that, because the laptop was not physically damaged and remained operational once its software was reinstalled, such misconduct would not warrant the denial of her reinstatement rights. Specifically, I find that the alleged misconduct was not, "violent or of such a character as to render . . . [her] unfit for further service." *C-Town*, supra.